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No. 03-107

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

BILLY JO LARA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF RESPONDENT BILLY JO LARA

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BRIEF OF RESPONDENT BILLY JO LARA

SUMMARY OF ARGUMENT

1. This Court correctly ruled in *Duro v. Reina*, 495 U.S. 676 (1990), that tribal courts do not possess inherent sovereignty to prosecute non-member Indians in tribal court.[1] Contrary to the government's position, Respondent Billy Jo Lara's tribal prosecution does not implicate the dual sovereignty doctrine. *Duro* and this case differ from *United States v. Wheeler*, 435 U.S. 313 (1978). There, the Court ruled that tribal courts possess inherent sovereignty to

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[1] A "non-member Indian" is an Indian enrolled in a federally recognized tribe different than his/her own tribe.

prosecute tribal members, and a tribal member's prosecution in both tribal and federal court does not violate the Double Jeopardy Clause of the Fifth Amendment. Here, Congress's grant of authority to the tribes to prosecute non-member Indians necessarily constituted a delegation of federal power. As such, Respondent's tribal and federal prosecutions were conducted under the same sovereign power, and the Double Jeopardy Clause applies.

The Court should uphold its ruling in *Duro v. Reina*. *Duro* is a logical extension of the Court's ruling that tribal courts do not possess inherent sovereignty to prosecute non-Indians, *see Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), but do possess inherent sovereignty to prosecute enrolled tribal members, *see Wheeler*, 435 U.S. 313. In *Duro*, the Court correctly determined that Indian tribes did not possess inherent tribal sovereignty to prosecute non-member Indians. Specifically, the Court held that the tribe surrendered its inherent sovereignty to prosecute non-member Indians when the tribe submitted itself to the over-arching authority of the United States. Further, the Court reasoned that because non-member Indians are United States citizens who do not possess any right of self determination in tribal governments other than their own, the Court's prior holding in *Wheeler* was not applicable. Non-member Indians more closely resemble the non-Indians in *Oliphant* than the member Indians in *Wheeler*.

Moreover, the Court's holding in *Duro* is supported by both prior and later opinions. *Montana v. United States*, 450 U.S. 544 (1980), *South Dakota v. Bourland*, 508 U.S. 679 (1993), *Nevada v. Hicks*, 533 U.S. 353 (2001), and *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001), all support the proposition that tribes do not possess inherent sovereignty to regulate the conduct of non-Indians and non-member Indians.

2. Because the Court's decision is based on the Constitution and is supported by constitutional underpinnings, Congress did not possess the authority to overrule *Duro*

legislatively. Congress exceeded its authority when it amended the Indian Civil Rights Act and purported to "restore" the tribe's "inherent sovereignty" to prosecute "all Indians." Because of the constitutional implications surrounding tribal sovereign power, this Court, not Congress, possesses the authority and the duty to determine the nature and extent of tribal sovereign power. The holding in *Duro* established that whatever sovereign power tribes previously possessed was surrendered upon the tribes' submission to the federal government. Thus, Congress cannot restore that which was necessarily surrendered.

Even if the Court determines that its holding in *Duro* was not based on the Constitution, Congress's actions are not unfettered and are always subject to the constraints of the Constitution. The Court possesses the power and the duty to determine "what the law is," and must examine every congressional action in the light of the enumerations and protections provided by the Constitution.

3. The court of appeals correctly determined that Congress's 1991 amendments to the Indian Civil Rights Act constituted a delegation of federal authority. Because the tribes did not possess inherent sovereignty to prosecute non-member Indians, any congressional action recognizing the tribes' ability to do so necessarily constitutes a delegation of federal authority.

Respondent was prosecuted in a tribal court pursuant to a congressional grant of authority, pled guilty, and was incarcerated for a period of ninety days. Under such circumstances, jeopardy attached to Respondent's tribal prosecution. Any subsequent prosecution for the same offense would violate the Double Jeopardy Clause.

The government's policy-based arguments ignore the fact that Respondent and all other Indians are U.S. citizens. The government's contention that the tribal courts, by affording

some constitutional rights to criminal defendants, adequately protect those defendants' rights ignores this fact. Moreover, contrary to the government's allegations, congressional delegation of federal prosecutorial authority to tribal courts would not result in a breakdown of the criminal justice system, but rather would increase tribal and federal cooperation on the Indian reservations.

ARGUMENT

I. THE COURT CORRECTLY RULED IN *DURO V. REINA* THAT TRIBES DO NOT POSSESS INHERENT SOVEREIGN POWER TO PROSECUTE NON-MEMBER INDIANS.

The fundamental question presented in this case is as follows: Is it the role of this Court, or the role of Congress, to determine the nature and extent of inherent tribal sovereignty? The underpinnings of inherent tribal sovereignty are found in the Constitution. As such, it is this Court, not Congress, that must act as the final authority on the limits of inherent tribal sovereignty. It is the Court's responsibility to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Based on the powers and limits of the United States Constitution, Respondent respectfully requests that this Court affirm its holding in *Duro v. Reina*, 495 U.S. 676 (1990), and affirm the dismissal of Respondent's federal indictment.[2]

[2] Respondent's conditional guilty plea preserved the Motion to Dismiss Indictment for Violation of Double Jeopardy and the Motion to Dismiss Indictment for Selective Prosecution or to Allow Additional Discovery Regarding Selective Prosecution. The district court's decision denying both motions was affirmed by the panel in the court of appeals. Respondent presented both to the court of appeals in his Petition for Rehearing en banc. When the court of appeals issued its en banc decision, it presumably did not reach the second motion because it was moot after the dismissal of the indictment on Double Jeopardy grounds. Respondent contends the Motion to Dismiss for Selective Prosecution should have been granted and would ask that if the Court reverses the decision of the court of appeals, the Court should also reverse the district court's ruling on the Motion for Selective Prosecution, or remand it to the court of appeals for re-consideration.

A. The Court Need Not Overrule Or Review The Dual Sovereignty Doctrine.

Respondent contends that his tribal and subsequent federal prosecutions for the same offense derived their authority from the same source of power and constitute a violation of the Double Jeopardy Clause. *See* U.S. Const. Amend. V. In its opening argument, the government contends that Respondent's prosecutions in both tribal and federal court did not amount to a violation of the Double Jeopardy Clause of the Fifth Amendment because of the exceptions found in the dual sovereignty doctrine. The dual sovereignty doctrine, however, does not apply because both of Respondent's prosecutions were based on federal power.

The Double Jeopardy Clause states that no person "shall be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. This constitutional protection, however, does not apply to a defendant prosecuted by two different sovereigns, even if the two prosecutions require proof of the same elements, because this Court has held that violations of two different sovereigns' laws do not constitute the same "offense." *See Heath v. Alabama*, 474 U.S. 82, 88 (1985); *Bartkus v. Illinois*, 359 U.S. 121 (1959).

Dual sovereignty is based on the principle that a crime can be committed against two separate sovereigns through the commission of a single act. *See Heath*, 474 U.S. at 88. For the doctrine to apply, it is pivotal that "the two entities draw their authority to punish the offender from distinct sources of power." *Id.* at 88. If the second entity draws its prosecutorial authority from the same source of power as the first entity,

then only one sovereign has been offended, and only one offense committed. *See id.* at 90. The second prosecution of the same offense then violates the Double Jeopardy Clause. *See, e.g., United States v. Wheeler*, 435 U.S. 313, 318 (1978).

Although a reversal of the dual sovereignty doctrine would result in the dismissal of Respondent's federal indictment, the Court need not overrule or even review its precedent discussing the dual sovereignty doctrine. Respondent respectfully disagrees with the Court's holding in *Heath*, but contends that an exhaustive review of this doctrine is unnecessary for the Court to affirm or overrule the decision of the court of appeals. The court of appeals presumed the validity of the dual sovereignty doctrine and still held that Respondent's subsequent federal prosecution violated the Double Jeopardy Clause.

The essential issue before the Court is whether this Court or Congress has the superior power to determine and define the constitutional limits of tribal sovereignty. If the Court determines that it possesses such authority, then the Court should reaffirm its holding in *Duro v. Reina*, 495 U.S. 676 (1990), that tribes lack inherent authority to prosecute non-member Indians. The Court's decision regarding the constitutional limits of tribal sovereignty cannot be legislatively reversed by Congress. Any delegation of authority to prosecute non-member Indians would be based on federal authority, and Respondent's subsequent federal prosecution would violate the Double Jeopardy Clause. Respondent respectfully contends that the dual sovereignty doctrine only applies if the Court first determines that its authority to define the limits and nature of tribal sovereignty is subject to congressional defeasance.

B. The Court Correctly Held In *Duro v. Reina* That A Non-Member Indian's Status As A United States Citizen Precludes Tribal Prosecutions Absent Congressional Delegation.

1. *The Court's holdings in* Oliphant *and* Wheeler *established the constitutional limits of tribal prosecutorial authority.*

In 1978, the Court issued the two seminal rulings on tribal jurisdiction. In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court determined that tribes do not have sovereign power to prosecute non-Indians. In *United States v. Wheeler*, 435 U.S. 313 (1978), the Court held that tribal courts did have sovereign power to prosecute tribal members. The case currently before the Court exists at the intersection of *Oliphant* and *Wheeler*. The issue presented is whether the tribe has sovereign power to prosecute non-member Indians in tribal court. The Court answered this question in *Duro v. Reina*, 495 U.S. 676 (1990), holding that tribes do not possess the authority to prosecute non-member Indians.

In *Oliphant*, the Court considered whether the tribe could exercise criminal jurisdiction over two resident non-Indians for crimes committed on the Port Madison Reservation near Seattle, Washington. *See* 435 U.S. at 194. The tribe based its assertion of criminal jurisdiction over non-Indians on the "Tribe's retained inherent powers of government over the Port Madison Indian Reservation." *Id.* at 196. Following an extensive review of Federal Indian law, the Court rejected the tribe's position. *See id.* at 208. Specifically, the Court stated that

> Indian Tribes do retain elements of "quasi-sovereign" authority after ceding their lands to the United States and announcing their dependence on the Federal Government. *See Cherokee Nation v. Georgia*, 5 Pet. 1, 15 (1831). But the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or

> congressional enactments. As the Court of Appeals recognized, Indian tribes are prohibited from exercising those powers of autonomous states that are expressly terminated by Congress and those powers "inconsistent with their status" [as dependants of the United States].

Oliphant, 435 U.S. at 208. In determining the limits on tribal sovereignty, the Court provided that

> [t]he tribes' retained powers are not such that they are limited only by specific restrictions in treatises or congressional enactments . . . . Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the Untied States and their exercise of separate power is constrained so as not to conflict with the interest of this overriding sovereignty. "[T]heir rights to complete sovereignty, as independent nations, [are] necessarily diminished."

Id. at 208-09 (alterations in original) (citations omitted). The Court concluded that "an examination of our earlier precedents satisfies us that, even ignoring treaty provisions and congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress." *Id.* at 208. Thus, in *Oliphant*, the Court established the initial framework that Indian tribes' criminal jurisdiction encompassed only powers found in treaties, congressional delegations, and those inherent powers whose exercise did not conflict with the tribes' dependant status.[3]

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[3] Respondent contends that the provisions of the treaty that recognized and later created the reservation on which he was prosecuted expressly prohibited tribal prosecution of non-member Indians. Article VI of the 1858 Treaty with the Sissiton and Wahpaton Bands of Dakota or Sioux Indians specifically states

> [The Sissiton and Wahpaton Bands of the Dakota or Sioux Indians] further pledge themselves not to engage in hostilities with the Indians of any other tribe . . . but to submit . . . all matters of dispute and difficulty between themselves and other Indians for the decision of the President of the United States, and to acquiesce in and abide thereby.

12 Stat. 1037, art. VI (June 19, 1858; ratified Mar. 9, 1859; proclaimed Mar. 31, 1859). By executing this Treaty and agreeing to submit to the overriding authority of the United States, the tribe surrendered any sovereign power it previously possessed to prosecute non-member Indians.

Shortly after *Oliphant*, the Court addressed the tribes' sovereign power to prosecute their own tribal members in *United States v. Wheeler*, 435 U.S. 313. There, the Court considered whether the Navajo tribe's authority to prosecute its own members was derived from retained, inherent sovereignty or from delegated, congressional power. *See id.* at 316. As in *Lara*, the case presently before the Court, Wheeler faced prosecutions in both tribal and federal court, forcing the Court to examine the nature and extent of tribal sovereignty. *See id.* at 316-18. In determining that Wheeler's tribal prosecution was pursuant to the tribe's inherent sovereign power, the Court stated "[i]t is undisputed that Indian tribes have power to enforce their criminal laws against tribe members. . . . Their right of internal self-government includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions." *Id.* at 322 (citations omitted.) The Court stated that this inherent authority was not lost due to the tribe's dependant status. *See id.* at 326. Tribal authority, however, had been implicitly divested in areas "involving the relations between an Indian tribe and non-members of the tribe." *Id.*

2. Duro v. Reina *extended the holdings of Oliphant and Wheeler to non-member Indians.*

In *Duro v. Reina*, 495 U.S. 676 (1990), the Court examined whether a tribe retained the inherent sovereignty to prosecute

a non-member Indian or whether such an exercise of prosecutorial jurisdiction amounted to an exercise of power that was "inconsistent with its dependant status." *Oliphant*, 435 U.S. at 208. Simply put, the Court was faced with determining whether a non-member Indian was more like the non-Indians in *Oliphant* or the tribal member in *Wheeler*.

Ultimately, the Court held that a tribe's criminal jurisdiction extended only to member Indians, and that any power to prosecute non-member Indians was inconsistent with its dependant status. *See Duro*, 495 U.S. at 686. Thus, the Court determined that any criminal jurisdiction a tribe may have over non-member Indians must come from a congressional delegation of authority, subject to the constraints and protections of the Constitution. *See id.* Such constitutional protections were necessary because "[t]he exercise of criminal jurisdiction subjects a person not only to the adjudicatory power of the tribunal, but also to the prosecuting power of the tribe, and involves a far more direct intrusion on personal liberties." *Id.* at 688.

The Court emphasized that all Indians are full citizens of the United States, and regardless of any historical record concerning tribal criminal jurisdiction, all Indians "are embraced with our Nation's 'great solicitude that its citizens are protected . . . from unwarranted intrusions on their personal liberty.'" *Duro*, 495 U.S. at 692 (quoting *Oliphant*, 435 U.S. at 210.) "Criminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States." *Id.* at 693. The Court further stated that

> [t]he retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members. . . . A tribe's additional authority comes from the consent of its members, and so the criminal sphere of membership marks the bounds of tribal authority.

Id. Explicit in the Court's holding is the principle that consent to be recognized as an Indian does not equate to the voluntary submission to every tribes' criminal jurisdiction.

The Court additionally noted that any congressional delegation of authority to tribal courts would be subject to the limitations found in the Constitution. *Id.* (citing *Reid v. Convert*, 354 U.S. 1, 39-40 (1957)). The same holds true for tribal authority over its members. "Retained criminal jurisdiction over members is accepted by our precedents and justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent." *Id.* at 694. A tribal member's consent to be governed is essential because "the tribes are left with broad freedom not enjoyed by any other governmental authority in this country." *Id.* (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 n.7 (1978)). It is the consent of its members that permits tribal government to dilute those members' constitutional rights. *See id.* at 694. For example, the Bill of Rights, in toto, is not applicable to Indian tribes. *See id.* (citing *Santa Clara Pueblo*, 436 U.S. at 56 n.7). "This is all the more reason to reject an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system." *See id.* at 694 (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 172, 173 (1982) (Stevens, J., dissenting)). It is this constitutional system that necessarily limits Congress's plenary powers and subjects every congressional action to this Court's review.

In light of *Oliphant*, *Wheeler*, and the fact that all Indians are full citizens of the United States, the Court in *Duro* concluded that a non-member's inability to participate in tribal government precluded the tribe's exercise of criminal jurisdiction over the non-member Indian. The Court's hold-

ing in *Duro* treats non-member Indians like non-Indians, as in *Oliphant*.

In direct response to the Court's ruling in *Duro*, Congress amended the Indian Civil Rights Act ("ICRA") to provide that the "powers of self-government" included "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. § 1301(2). Congress further amended ICRA to define "Indian" as "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153 of Title 18 if that person were to commit an offense listed in that section in Indian country to which that section applies." *Id.* § 1301(4). Congress however, acted improperly in attempting to overrule legislatively the Court's decision in *Duro*, a ruling principally grounded in the Constitution.

C. This Court's Prior And Subsequent Rulings Support The Court's Holding In *Duro v. Reina*.

Both before and after the Court's ruling in *Duro*, the Court has issued opinions describing the nature and extent of inherent tribal sovereignty. Congress's plenary power is limited by "judicially enforceable outer limits," including the "judiciary's duty to say what the law is." *Marbury*, 5 U.S. (1 Cranch) at 177. As such, the Court's opinions, coupled with the Court's holdings in *Oliphant* and *Wheeler*, form the backbone of federal Indian law as it pertains to tribal jurisdiction and ultimately support and uphold the Court's ruling in *Duro*.

In 1980, the Court issued its decision in *Montana v. United States*, 450 U.S. 544 (1980). In *Montana*, the Court considered the power of the tribe to regulate non-Indian hunting and fishing on reservation land owned in fee simple by "non-members of the Tribe." *Id.* at 557. In considering the issue, the Court reviewed the applicable treaties as well as its precedent interpreting similar treaties. *See id.* at 550-57.

Following this review, the Court held that neither the tribe's treaties with the United States nor its retained, inherent sovereignty permitted the tribe to regulate such activity. *See id.* at 557. The Court, relying on *Wheeler*, recognized that tribal governments retained some sovereign powers, "[b]ut the exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependant status of the tribes, and so cannot survive without express congressional delegation." *Id.* at 564 (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973); *Williams v. Lee*, 358 U.S. 217, 219-20 (1959); *United States v. Kagama*, 118 U.S. 375, 381-82 (1886); *Clanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171 (1973)). The Court then considered the proposed regulation in light of *Oliphant* and stated that *Oliphant* supported the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe." *Id.* at 565. In so holding, the Court reaffirmed the principles stated in *Oliphant* and *Wheeler*, that a tribe's inherent sovereign powers only extend to members of the tribe.

Although this case represents the Court's first opportunity to construe Congress's 1991 amendments to ICRA, the Court has affirmed the principle that tribes do not possess inherent sovereignty over non-member Indians, and that criminal jurisdiction over non-member Indians exists only pursuant to an affirmative delegation from Congress.[4] In *South Dakota v.*

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[4] The government and *amici* cite *United States v. Long*, 324 F.3d 475, 483 (7th Cir. 2003), *cert. denied*, 124 S.Ct. 151 (2003) (Oct. 6, 2003), as an example of Congress "restoring" a tribe's inherent sovereignty. (*See* Petitioner's Brief, at 26 n.6.) As the court of appeals recognized in *Long*, however, the situation in that case does not involve the issues currently before the Court. *See* 324 F.3d at 483. The powers Congress extended to the Menominee tribe, *see* 25 U.S.C. § 903-903f, did not involve the establishment of new "inherent" rights. *See Long*, 324 F.3d at 483. By re-establishing the Menominee tribe by congressional recognition,

Bourland, 508 U.S. 679 (1993), a case concerning tribal hunting regulations for non-Indians on tribal lands, the Court stated that

> [t]he dissent's complaint that we give "barely a nod" to the Tribe's inherent sovereignty argument is simply another manifestation of its disagreement with *Montana*, which announced "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe." 450 U.S. at 565. While the dissent refers to our "myopic focus" on the Tribe's prior treaty right to "absolute and undisturbed use and occupation" of the taken area, it shuts both eyes to the reality that after *Montana*, tribal sovereignty over non-members "cannot survive without express congressional delegation,' 450 U.S. at 564, *and is therefore not inherent*.

Bourland, 508 U.S. at 695 n.15 (emphasis added).

Most recently, the Court addressed the issue of inherent tribal sovereignty in *Nevada v. Hicks*, 533 U.S. 353, 358-59 (2001). In *Hicks*, the Court affirmed the general principle that tribes cannot exercise jurisdiction over non-members in a manner inconsistent with the tribe's dependant status, unless via a congressional delegation. *See id.* at 358-59. Moreover, the concurring opinion in *Hicks* provides that the Court's decision in *Duro* specifically recognized that inherent tribal sovereignty did not extend to non-member Indians and that "Congress passed a statute expressly granting tribal courts such jurisdiction." *Id.* 533 U.S. at 377 n.2 (Souter, J. concurring). The concurring opinion then explained that "[in *Hicks*] we are concerned with the extent of the tribes' inherent authority and not with the jurisdiction statutorily conferred upon them by Congress . . ." *Id.*; *see also Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) (declining to impose a

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Congress merely recognized the tribal rights that Congress had previously taken away from the Menominee. *See id.*

hotel occupancy tax on a non-member-owned reservation hotel on non-Indian land).

By definition, inherent sovereignty existed independent of congressional recognition, and any recognition of tribal criminal jurisdiction over non-member Indians is necessarily a delegation of federal authority to the tribe. *See Bourland*, 508 U.S. at 695 n.15 (citing *Montana*, 450 U.S. at 564). As the Court held in *Duro* and affirmed most recently in *Bourland, Hicks* and *Atkinson*, tribal sovereign power does not permit criminal or regulatory jurisdiction over non-Indians or non-member Indians.

II. THE COURT'S HOLDING IN *DURO V. REINA* WAS BASED ON CONSTITUTIONAL PRINCIPLES AND CONGRESS CANNOT LEGISLATIVELY REVERSE THE COURT'S INTERPRETATION OF THE CONSTITUTION.

A. The Court Decided *Duro* As A Constitutional Case.

The court of appeals correctly recognized that this Court's decision in *Duro v. Reina*, 495 U.S. 676, was grounded in constitutional principles and that Congress lacks the authority to reverse the decision legislatively. *See United States v. Lara*, 324 F.3d 635, 639-40 (8th Cir. 2003) (en banc). As acknowledged by the court of appeals, "the distinction between a tribe's inherent and delegated powers is of constitutional magnitude and therefore is a matter ultimately entrusted to the Supreme Court. Absent a delegation from Congress, a tribe's powers are those "inherent powers of a limited sovereignty which [have] never been extinguished." *Id.* at 639 (internal quotations and citations omitted). As a result, "[o]nce the federal sovereign divests a tribe of a particular power, it is no longer an inherent power and it may only be restored by delegation of Congress's power." *Id.*

While Respondent acknowledges that Congress has broad plenary power to regulate tribal affairs, *see Wheeler*, 435 U.S. at 319, Congress's power is subject to the limitations imposed by the Constitution. The Court has long recognized that "'this power to control and manage [is] not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it [is] subject to limitations inhering in . . . a guardianship and to pertinent constitutional restrictions.'" *United States v. Sioux Nation of Indians*, 448 U.S. 371, 415 (1980) (quoting *United States v. Creek Nation*, 295 U.S. 103, 109-10 (1935)).

Constitutional concerns clearly guided the Court's decision in *Duro*. Throughout the opinion, the Court refers to the powers and limitations found in the Constitution. Reflecting on the earlier decision in *Wheeler*, the Court stated that "[h]ad the prosecution been a manifestation of external relations between the Tribe and outsiders, such power would have been inconsistent with the Tribe's dependent status, and could only have come to the Tribe by delegation from Congress, *subject to the constraints of the Constitution*." *Duro*, 495 U.S. at 686 (emphasis added). Clearly, the Court was acknowledging the constitutional limitations placed on Congress when delegating to tribes the power to prosecute non-member Indians.

The Court, in *Duro*, further recognized the personal liberty rights possessed by all Indians, stating that ". . . Indians like other citizens are embraced within our Nation's great solicitude that its citizens be protected . . . from unwarranted intrusion on their personal liberty." *Id.* at 692 (internal quotations omitted). This concept is derived directly from the Fifth Amendment of the Constitution. *See id.* Additionally, the Court's jurisprudence "suggest[s] constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right." *Id.* at 693. The constitutional concern at issue in *Duro* was

"an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system." *Id.* at 694. As a result of these constitutional concerns, the Court ultimately declined "to adopt a view of tribal sovereignty that would single out another group of citizens, non-member Indians, for trial by political bodies that do not include them," especially in light of the fact that the Bill of Rights does not apply to tribal governments. *Id.* at 693 (citing *Talton v. Mayes*, 163 U.S. 376 (1896)).

By recognizing that Indians are full citizens who "share in the territorial and political sovereignty of the United States," the Court understood the underlying danger in providing tribes with the inherent authority to criminally prosecute non-member Indians. *See id.* at 693. While acknowledging that tribal courts often resolve civil disputes involving non-members, including non-Indians, this Court found that "[t]he exercise of criminal jurisdiction subjects a person not only to the adjudicatory power of the tribunal, but also to the prosecuting power of the tribe, and involves a far more direct intrusion on personal liberties." *Id.* at 688. Moreover, "[c]riminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States." *Id.* at 693. Therefore, if the Court's recognition of Indians as full United States citizens is to have any real meaning, the Court must act to protect the constitutional rights of Indians at least in the context of criminal proceedings by prohibiting successive, federally authorized tribal and federal prosecutions in violation of the Fifth Amendment's Double Jeopardy Clause.

In support of its view that *Duro* is not a constitutional decision, the government claims that history supports a finding that tribes exercised criminal jurisdiction over non-

member Indians even after ratification of the Constitution. (*See* Petitioner's Brief at 28.) This argument, however, ignores the fact that prior to 1924, Indians were not citizens of the United States and were not afforded the protections of the Constitution. *See Duro*, 495 U.S. at 692 (citing Felix Cohen, *Handbook of Federal Indian Law*, 142-43 (1982)); Pub. L. No. 68-175, 43 Stat. 253 (codified at 8 U.S.C. § 1401(b) (affording citizenship to "person[s] born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe"). The government's argument also ignores the specific holdings of the Court in *Duro* that the historical evidence "on balance supports the view that inherent tribal jurisdiction extends to tribe members only," 495 U.S. at 691, and does not support the government's contention that tribes maintained prosecutorial power over non-members.

Although the government attempts to cloud the issue by citing treaties and congressional testimony (*see* Petitioner's Brief at 28-31), Respondent declines to engage in a historical battle over the bounds of inherent tribal sovereignty. Clearly, Congress cannot, as the government contends, "restore" inherent sovereignty. By its very nature, inherent tribal sovereignty existed long before European colonists descended upon North America. As the Court found in *Duro*, any inherent sovereignty the tribes may have had regarding prosecution of non-member Indians was surrendered when the tribes submitted themselves to the overriding authority of the United States. *See* 495 U.S. at 688. Congress cannot restore something that the tribes lost—Congress's plenary authority over Indians does not extend this far. *See Bourland*, 508 U.S. at 695 n. 15.

The Constitution's boundaries respecting the sovereignty of the federal government, the states, and Indian tribes cannot be altered or redefined by Congress. Under our Constitution, the respective boundaries of sovereignty are what they are.

Thus, under the Constitution, states may not make treaties with foreign nations, as this attribute of sovereignty was surrendered by the states under the Constitution. Just as Congress may not return to the states attributes of sovereignty taken away by the Constitution, neither may Congress purport to return to Indian tribes those attributes of sovereignty the Constitution itself removed from the tribes.

This Court already decided the question of tribal sovereign power in *Duro* after a careful and informed analysis of the relevant evidence and ruled that inherent tribal sovereignty does not extend to criminal prosecutions of non-member Indians. *See* 495 U.S. at 692. The Court need not address these factual disputes again in reaching a decision in the present matter.

Adopting the government's position that tribes always have had the inherent authority to prosecute non-member Indians would require the Court to explicitly overrule its prior decision in *Duro*. At the heart of *Duro* is the principle that a criminal defendant cannot be prosecuted in a tribunal that denies basic constitutional safeguards. It is difficult to imagine a decision more grounded in the Constitution than a decision from this Court protecting basic constitutional rights. Because the Court's decision in *Duro* is a constitutional ruling, Congress does not possess the power to legislatively reverse that decision. *See City of Bourne v. Flores*, 521 U.S. 507, 529 (1997); *Marbury*, 5 U.S. (1 Cranch) at 177.

B. Even If *Duro* Is Not A Constitutional Decision, Every Congressional Action Is Subject To Constitutional Review.

If the Court determines that its decision in *Duro* was not based on the Constitution, it would not give Congress the unlimited authority to legislatively replace the Court's holding. Through Congress's enumerated power found in the Indian Commerce Clause, the Constitution grants Congress

the authority to regulate the activity of Indian tribes.[5] U.S. Const. Art I, § 8, cl. 3. As this Court has often stated, Congress's power over Indians is plenary. *See Negonsott v. Samuels*, 507 U.S. 99, 103 (1993); *Santa Clara Pueblo*, 436 U.S. at 56; *Wheeler*, 435 U.S. at 327. Moreover, as the government and amici frequently point out, in *Duro* this Court recognized that Congress "has the ultimate authority over Indian affairs." *Duro*, 495 U.S. at 698.

However, even with such recognition, the Court noted that congressional actions pursuant to these enumerated powers are "*subject to the constraints of the Constitution.*" *Id.* at 686 (emphasis added). As the Court has stated, "[t]he power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946) (plurality opinion) (holding Congress's plenary power does not "enable the United States to give the tribal lands away to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them"); *see also Stephens v. Cherokee Nation*, 174 U.S. 445, 478 (1889) (providing that "Congress possesses plenary power of legislation in regard to [Indian tribes], subject only to the Constitution of the United States, [and] the validity of remedial legislation of this sort cannot be questioned unless in violation of some prohibition of that instrument").

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[5] The government and amici liken this "power" to Congress's "paramount authority" to review federal common law. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981) (quoting *New Jersey v. New York*, 283 U.S. 336, 348 (1931)). However, federal common law is a judge-made tool used to protect federal interests where Congress has not spoken. *See id.* at 313 (citing *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966)). Should this Court determine that *Duro* was not a constitutional ruling, it would not necessarily follow that *Duro* was a federal common law case. Although the government states that Congress has the authority to alter federal common law decisions, such a blanket statement fails to address the unique situation presented in this case.

Congress's powers are limited to those enumerated powers found in the Constitution. *See* U.S. Const. Art. X; *City of Bourne*, 521 U.S. at 529. The Court has explicitly recognized that although Congress's authority extends to authorize legislation in the areas of Indian affairs, this authority is necessarily tempered by the Constitution and the Court's interpretations of it. *See Duro*, 495 U.S. at 686; *Alcea Band of Tillamooks*, 329 U.S. at 54. For example, it is axiomatic that Congress can regulate commerce between the states. *See United States v. Lopez*, 514 U.S. 549, 558 (1995); U.S. Const. Art I, § 8, cl. 3. However, any such regulation is subject to judicial review to ensure that such regulations pass constitutional muster. *Lopez*, 514 U.S. at 566 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Marbury*, 5 U.S. (1 Cranch) at 177). As such, Congress's regulatory power, when exercised pursuant to the Commerce Clause, the Indian Commerce Clause, or any other enumerated power, can never be, as the government alludes in its brief, unfettered and unchecked. The federal judiciary, and ultimately this Court, bear the supreme responsibility to say what the law is.

Having demonstrated that Congress's plenary powers are limited by the Constitution, Congress's enactment of 25 U.S.C. § 1301(2) violates the rights of U.S. citizens. Respondent is unquestionably a full citizen of the United States and, as a full citizen, Respondent is entitled to all the protections afforded by the Constitution.[6] *See Duro*, 495 U.S.

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[6] As the Court forcefully stated in *Duro*, "[w]hatever might be said of the historical record, we must view it in light of petitioner's status as a citizen of the United States." *Duro*, 495 U.S. at 692. By so doing, the Court signaled its position regarding the individual versus the tribe. Although the Court's prior rulings recognize Indians as polity rather than individuals, *see United States v. Antelope*, 430 U.S. 641 (1977), and *Morton v. Mancari*, 417 U.S. 535 (1974), the Court in *Duro* examined the issue in the reverse. In *Duro*, the Court correctly ruled that the application of tribal criminal jurisdiction constituted "an unwarranted intrusion into

at 692. Congress cannot subject United States citizens to "criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right." *Id.* (citing *Reid v. Covert*, 354 U.S. 1 (1957)). As the Court pointed out in *Duro*, and the government reluctantly recognizes, ICRA does not guarantee all of the protections found in the Bill of Rights, including an indigent's right to counsel. *See* 495 U.S. at 693; Petitioner's Brief, at 39. By subjecting Respondent to the criminal jurisdiction of the Spirit Lake Tribal Court, Congress has improperly permitted a dilution of Respondent's constitutional rights.[7] In amending ICRA, Congress overstepped its constitutional grant of authority to regulate the activity of Indian tribes.[8] This Court, empowered to enforce the rights guaranteed by the Constitution, should exercise this power and determine that Congress's enactment

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their personal liberty." 495 U.S. at 692 (quoting *Oliphant*, 435 U.S. at 210). Implicit in this holding is that Albert Duro's personal liberties are superior to the tribe's interests in extending its criminal jurisdiction over him and denying him those same liberties.

[7] Under the Sixth Amendment, Respondent would be entitled to a court-appointed lawyer in federal or state court. *See* U.S. Const. Amend VI; *Argersinger v. Hamlin*, 407 U.S. 25, 36-37 (1972).

[8] Under the 1991 amendments, non-member Indians will be subject to the "laws and mores" of what potentially could be a tribe with vastly different "tribal customs and traditions." *See Wheeler*, 435 U.S. at 331. For example, imagine a member of the Yakatuk tribe located in Alaska, arrested for an offense committed on the Seminole reservation in Florida and subjected to the laws and mores of a culture vastly different than her or his own. This is the impact of Congress's decision to overrule the Court's holding in *Duro*. As the Court held in *Duro*, "the tribes are not mere fungible groups of homogeneous persons among whom any Indian would feel at home. On the contrary, wide variations in customs, art, language, and physical characteristics separate the tribes, and their history has been marked by both intertribal alliances and animosities." 495 U.S. at 695 (citations omitted). By recognizing these differences, the Court signaled to Congress that any legislative response to *Duro* must comply with the protections found in the Constitution.

results in a violation of Respondent's constitutional rights, and the rights of all other non-member Indians.[9]

III. RESPONDENT'S FEDERAL PROSECUTION VIOLATED THE FIFTH AMENDMENT'S DOUBLE JEOPARDY CLAUSE AND SHOULD NOT STAND.

A. The Delegation Of Congressional Authority To Prosecute Non-Member Indians Was Proper.

The court of appeals determined that it need not void Congress's 1991 ICRA amendments because although Congress could not overrule the Court's decision in *Duro*, it could delegate federal authority to the tribe. *See Lara*, 324 F.3d at 640. The government and amici claim that the court of appeals failed to consider Congress's intent and improperly interpreted the 1991 amendments as a delegation of federal authority. Respondent contends otherwise.

As the government, the *amici*, and the concurring opinion in *Hicks* contend, Congress wanted to ensure that tribes had the power to prosecute non-member Indians in tribal courts. The Court in *Duro* recognized that its decision possibly created a jurisdictional void. *See* 495 U.S. at 696. The "Duro-fix" legislation was meant, first and foremost, to close that void. This intent need not be ignored, and Congress's amendments need not be considered a nullity. The fact that Congress mistakenly believed it could "restore" tribal inherent sovereignty merely demonstrates Congress's misunderstanding of the nature and extent of tribal sovereign power and this Court's role in defining the limits of that

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[9] Congress's enactment of 25 U.S.C. § 1301(2) violates the rights of all Indians. But such violations are permissible by a tribal court prosecuting a tribal member. *See Duro*, 495 U.S. at 694. By choosing to enroll in a tribe, the tribal member consents to both the benefits and burdens imposed by tribal membership. *See id.*

power. Congress cannot restore those principles of inherent sovereignty which were necessarily lost by the tribe's submission to overriding federal authority. The *Constitution*, not Congress, divested the Indian tribes of inherent authority to try non-member Indians. Congress may, as it did here, invest Indian tribes with authority to try non-members by a delegation of its authority, just as Congress may invest the District of Columbia with authority to try criminal offense. *See, e.g., United States v. Mills*, 964 F.2d 1186, 1193 (D.C. Cir. 1992) (en banc). What Congress cannot do, however, is return attributes of sovereignty to the Indian tribes that the Constitution itself removed. Thus, if Congress delegates authority to the tribe, that delegation is subject to the strictures of the Double Jeopardy Clause.

It does not lesson Congress's desire to maintain and defend order on the reservations. It appears that Congress believed it could "restore" tribal sovereignty and overrule the Court's holding in *Duro*. As explained above, it could do neither. However, as the court of appeals correctly held, Congress's actions can be viewed as a delegation of federal authority to the tribes, thus ensuring that the spirit of Congress's intent is followed. Respondent respectfully submits that the lower court's conclusion was correct, and its decision should be affirmed.[10]

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[10] Respondent recognizes that if Congress's amendments delegated federal authority to prosecute non-member Indians to the tribes, it is possible that Fifth Amendment Due Process concerns may exist. However, whether the delegation violates the Fifth Amendment's Due Process Clause is not currently before the Court in this case. Here, the question is much more simple: did Congress delegate federal authority to the tribal courts to prosecute non-member Indians? Respondent contends the answer to this question is yes, and thus, his subsequent federal prosecution violates the Double Jeopardy Clause. As the Court stated in *Duro*, it is Congress's job to determine the extent of tribal jurisdiction, *subject to the Constitution*. *See Duro*, 495 U.S. at 686 (emphasis added). The Court need not resolve any potential Due Process implications created by a federal delegation in this case. Rather, the Court can instruct Congress, as the Court did in *Duro*, to remedy these problems such that they pass constitutional muster. Congress has already provided such a mechanism by permitting states to assume jurisdiction over crimes in Indian country. *See* Pub. L. No. 280, Act of Aug. 15, 1953, Ch. 505, 67 Stat. 588 (codified, as amended, at 18 U.S.C. § 1162, 28 U.S.C. § 1360). Moreover, neighboring tribes can engage in reciprocal agreements which permit concurrent jurisdiction over each tribe's members. *See Duro*, 495 U.S. at 697.

B. Jeopardy Attached To Respondent's Tribal Court Prosecution And His Subsequent Federal Prosecution Is Double Jeopardy.

The government contends that if Congress's attempt to "restore" inherent tribal sovereignty to the Spirit Lake Sioux Tribe was impermissible, then the tribe was without jurisdiction to prosecute Respondent. As such, the government argues that because the tribal court never possessed the power to prosecute Respondent, jeopardy never attached and Respondent's subsequent federal prosecution does not violate double jeopardy. (*See* Petitioner's Brief at 43.)

Contrary to the government's position, Respondent was placed in jeopardy during his tribal prosecution, thus precluding the subsequent federal prosecution.[11] First, Respondent appeared before the Spirit Lake Reservation tribal court pursuant to 25 U.S.C. § 1301(2), the statute unquestionably in effect at the time of Respondent's arrest. Second, Respondent pleaded guilty to the misdemeanor assault charge in the tribal court. When a criminal defendant pleads guilty and the court accepts the plea, jeopardy attaches. *See, e.g., United States v. Smith*, 912 F.2d 322, 323-24 (9th Cir. 1990); 5

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[11] In the Brief of *Amicus Curiae* of the States of Idaho, Alabama, Louisiana, Nebraska, South Dakota and Utah, the *amici* contend that the double jeopardy question is unreachable by this Court because Congress's 1991 ICRA amendments cannot be construed as a delegation. (Brief of *Amicus Curiae* State of Idaho, *et al.*, at 12-17.) This argument, however, ignores the fact that jeopardy attached in Respondent's tribal prosecution.

Wayne R. LaFave, *et al*, *Criminal Procedure*, §25.1(d) (2d ed. 1999). Third, Respondent served more than seventy days of his tribal sentence before federal prosecutors indicted Respondent for assaulting the tribal/BIA officer. The entire length of Respondent's ninety-day sentence has now been served. If jeopardy attaches when a criminal defendant pleads guilty and the court accepts the plea, jeopardy most certainly attaches when that same defendant has been sentenced and incarcerated pursuant to that plea. Respondent, by pleading guilty, receiving a sentence, and serving that sentence, was placed in jeopardy for purposes of the Fifth Amendment's Double Jeopardy Clause.

The government cites *Serfrass v. United States*, 420 U.S. 377 (1975), *Grafton v. United States*, 206 U.S. 333 (1907), *United States v. Ball*, 163 U.S. 662 (1896), *Kepner v. United States*, 195 U.S. 100, 129 (1904), and *United States v. Phelps*, 168 F.3d 1048 (8th Cir. 1999), for the proposition that an individual cannot be placed in jeopardy if prosecuted by a court that had no prosecutorial jurisdiction over the individual. (*See* Petitioner's Brief at 43.) These cases are either distinguishable or supportive of Respondent's position.

First, the defendant in *Serfrass* based his double jeopardy claim on the dismissal of a previous indictment. *See* 420 U.S. at 389. Next, in *Ball*, the initial prosecution resulted in an acquittal, but it was later determined that the indictment charging the offense was defective. *See* 163 U.S. at 669-70. The Court determined that the subsequent prosecution on a proper indictment constituted double jeopardy, because notwithstanding the defective indictment, the court had jurisdiction over the person and the subject matter. *See id.* Similarly, in *Kepner*, the Court applied the holding from *Ball* and concluded that a statute permitting the State to appeal acquittals in criminal cases violated the double jeopardy clause. *See* 195 U.S. at 133-34. The decisions in *Ball* and *Kepner* support Respondent's argument because the Court

held that the subsequent prosecutions violated the Double Jeopardy Clause.

In *Phelps*, the tribal court prosecuted a non-Indian for an offense on the reservation, in violation of the long-standing principle issued in *Oliphant*, 435 U.S. at 205. *See Phelps*, 168 F.3d at 1054-55. The defendant asserted a double jeopardy claim in his subsequent federal prosecution, which the court of appeals rejected, stating that under the clear holding in *Oliphant*, the tribal court never possessed jurisdiction over the non-Indian defendant. *See id.* at 1054.

Each of these cases represent vastly different factual scenarios than the circumstances giving rise to Respondent's double jeopardy claim, a claim based on his charge, plea of guilty, and incarceration for one-quarter of one year. In the matter before the Court, the Spirit Lake tribal court prosecuted Respondent under the authority granted to it by Congress's 1991 amendments to ICRA. The court of appeals' holding in *Phelps* clearly differs in that the tribal court's prosecution violated this Court's twenty-year-old precedent that had never been challenged by Congress or overruled by this Court.

Grafton v. United States further supports Respondent's position. In *Grafton*, the defendant was first tried and convicted by a military court martial in the Philippine Islands. *See* 206 U.S. at 341. Subsequently, a Philippine civilian court sought to try the defendant for the same offense. *See id.* at 342-43. At the time of this second prosecution, the Philippine civilian court operated pursuant to a congressional grant of authority. *See id.* at 351-52. The Court determined that the second prosecution violated the Double Jeopardy Clause because both the military court and Philippine court derived their authority from the same source—Congress. *See id.* at 352.

These are the precise circumstances in the matter currently before the Court. The Spirit Lake Tribal Court prosecuted Respondent pursuant to a congressional delegation of authority. At the time of Respondent's prosecution, the tribal court had no reason to doubt Congress's ability to confer such jurisdiction on it, nor did the tribal court have any need to question the validity of the IRCA amendments. Respondent's tribal prosecution was conducted pursuant to the law of the land, as it stood at that time.

If the Court determines that Congress acted beyond its authority in passing these amendments, it should have no practical effect on the validity of Respondent's tribal prosecution, guilty plea, and incarceration. In effect, the government requests that if this Court rules in Respondent's favor and invalidates the ICRA amendments, the Court should apply that ruling retroactively, rewrite history, and declare that Respondent's tribal prosecution, and more importantly, his incarceration, never occurred. Congress cannot rewrite history and cannot rewrite the logs of the Spirit Lake Tribal jail. No matter what is said of Respondent's contact with the tribal court, it cannot be disputed that Respondent *was* punished. The Double Jeopardy Clause prevents more than jeopardy. Its history, predating the United States Constitution, is to prevent dual *punishment* far more than dual investigations, charges and trials.

C. The Government's Remaining Policy-Based Arguments Are Either Irrelevant To The Protection Of Respondent's Constitutional Rights, Wrongly Presented, Or Both.

Perhaps recognizing the impact of the Court's statements in *Duro* that Indians should be afforded constitutional rights, the government contends that Respondent's tribal prosecution did not violate the due process rights guaranteed by the Fifth Amendment. (*See* Petitioner's Brief at 39.) The government states that "Congress could reasonably conclude that non-

member Indians' personal liberties are, as a general matter, adequately protected in a tribal prosecution—and that, in the event that some fundamental liberty is denied in a particular case, relief can be sought on federal habeas review." (*Id.*) The government further argues that ICRA provides some, but not all, of the rights guaranteed by the Constitution, and those rights not guaranteed (most notably the right to counsel) are not implicated in most tribal prosecutions.[12] (*Id.* at 39-40.)

By making this contention, the government ignores the specific admonition of the Court in *Duro*—Indians are full citizens of the United States. *See* 495 U.S. at 692. As full citizens, Indians' constitutional rights should not be subjected to dilution because they are Indians. The government notes that "24% of the Tribes then provided counsel for indigent defendants in tribal court, and that 46% provided either counsel or trained-lay advocates." (Petitioner's Brief at 40 (citing Impact of the Supreme Court's Ruling in *Duro v. Reina*: Hearing Before the Senate Select Comm. on Indian Affairs, 102d Cong., 1st Session. Pt. 2, at 218 (1991))). Apparently, the government considers it adequate that more than seventy percent of all Indians prosecuted in tribal court are not guaranteed the right to counsel. Although the Court

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[12] As the Court noted in *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)

> That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with a crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

has deemed it constitutionally permissible to abrogate the rights of tribal members because of their consent to tribal authority, *see Duro*, 495 U.S. at 494, the same rationale cannot be applied to non-member Indians who did not consent to another tribe's authority.

The government's due process argument is also riddled with inconsistencies. First, the government contends that the federal government lacks the resources to prosecute misdemeanor crime on the reservations. (*See* Petitioner's Brief at 38) (citing S. Rep. No. 168, at 4 (stating that "U.S. Attorneys, already overburdened with the prosecution of major crimes, could not assume the caseload of criminal misdemeanors referred from tribal courts for prosecution of non-member Indians.")). However, just a few pages later, the government argues that in the event of an unconstitutional conviction, the non-member Indian can seek federal review via a habeas corpus petition.[13] (*See* Petitioner's Brief at 42.) The inconsistency of this argument is apparent on its face. In one instance, federal prosecutors are far too busy to deal with the direct prosecution of non-member Indians, but apparently they nevertheless have more than enough time and resources to defend these tribal prosecutions on federal habeas review. Burdens placed on the United States Department of Justice, this nation's largest law firm, are not sufficient grounds to justify the violation of a citizen's constitutional rights.

[13] The government claims that because few federal habeas corpus petitions are filed following tribal prosecutions, one can assume that tribal courts do not deny defendants their constitutional rights. (*See* Petitioner's Brief at 42.) This argument, however, fails to consider all potential factors at play. For example, the absence of habeas petitions from indigent defendants prosecuted in tribal court could be the result of the non-application of the right to counsel to tribal prosecutions. Simply put, the convicted defendant likely does not know what he/she is constitutionally entitled to claim, much less how to petition a U.S. district court for relief.

Moreover, the government's claim that federal prosecutors are overworked is not borne out by the statistics prepared by the United States Department of Justice. Since 1993, the total number of court-related attorney work hours has decreased from 1,285 to 930 hours per attorney. *See* 2002 U.S. Dept. of Justice Ann. Rep., U.S. Attorneys' Annual Statistical Rep. at 4. That is a decrease of more than 25% in ten years. Additionally, since 2000, that same number has plateaued, fluctuating between 927 hours in 2000, 916 hours in 2001, and 930 hours in 2002. *See id.* Coinciding with this decrease in attorney court time, the number of federal prosecutors has increased from 4,155 in 1993 to 5,304 in 2002. *See id.* at 3. As these statistics demonstrate, federal prosecutors have more, not less, time than in recent history.

The government argues that a tribal prosecution of an indigent who did not receive the benefit of counsel could be cured of any constitutional infirmity if the tribal prosecutor forgoes requests for incarceration. (*See* Petitioner's Brief at 41.) The government makes this argument while at the same time contending that the maximum tribal punishment available (one year incarceration and a $5,000 fine) is inadequate to preserve public safety on the reservations. (*See* Petitioner's Brief at 19.) In effect, the government is saying that public safety on the reservation compels the recognition of inherent tribal sovereignty to prosecute non-member Indians, but incarceration should be waived to prevent constitutional violations. Thus, the tribe can prosecute all non-member Indians, but they cannot incarcerate them when convicted for their crimes.

Next, the government's contention that if tribes are delegated federal prosecutorial power over non-member Indians, "[a] non-member Indian would have a great incentive to enter a prompt guilty plea in a tribal prosecution, thereby gaining protection from federal prosecution." (Petitioner's Brief at 21.) Although the government's concern is real, its impact is

within the government's control. Every state has at least one U.S. Attorney's office that necessarily must communicate with tribal prosecutors on reservations in that state. Although the government alleges that U.S. Attorneys are overworked, it can be argued that tribal prosecutors are just as busy, if not more busy than their federal counterparts. It would be a rare case where a tribal prosecutor would not defer to his or her colleagues at the U.S. Attorney's office to reduce his or her caseload and get a more appropriate sentence.

The government's contention also assumes that the criminal defendant is the only person involved in the decision to charge an offense or plead guilty. A defendant cannot force a tribal prosecutor to charge him. A defendant cannot plead guilty to an offense without the prosecutor's knowledge. Both the tribal prosecutor and the tribal court must be involved in any guilty plea. The tribal court must accept the guilty plea and it can be assumed that if the tribal judge questions the appropriateness of a misdemeanor charge, the prosecutor will be asked if the U.S. Attorney has had appropriate input on the case. The government's concern on this point would require a breakdown of the system between the tribal prosecutor, the tribal court, and the U.S. Attorney.

There is no contention that tribal prosecutors care less about law enforcement than U.S. Attorneys. There is no contention that these tribal prosecutors are corrupt or relish the opportunity to allow murderers to plead guilty to tribal assault charges to avoid a federal murder prosecution. As a practical matter, this Court's affirmance of *Duro* would increase communication and cooperation between tribal and federal prosecutors. This would result in a better use of resources and likely lead to more efficient prosecutions in tribal courts and ensure greater safety on the Indian reservations.

CONCLUSION

For the reasons stated above, Respondent, Billy Jo Lara, respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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